BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DITTO OF CALIFORNIA, INC.
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-407
Case No. TFS-78-163

Employer Account No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Claimant: Cecelia Aguilar
S.S.A. No.:

Office of Appeals No. NH-TFS-23536

The Department appealed from the decision of the administrative law judge which granted the petitioner's petition for reassessment of an assessment levied under the provisions of section 1142 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant last worked for the employer herein on January 28, 1977 after which time she went on a two-month maternity leave of absence. She reported back to her employer the following April and was informed by her supervisor that work was slow and to give him a call in a month. She called back as instructed and was informed by her supervisor that her position "had been closed down" and no one would be hired to replace her. The employer had no need for her position and had no other position for her at that time.

Thereafter, the claimant filed a claim for unemployment benefits effective July 17, 1977. She completed an Unemployment Insurance Claim Filing Form (form DE 1101C), on which she indicated the reason she was no longer working on her last job as follows: "Job was omitted while on Mat. leave." The Department mailed notice of that claim to the employer herein on July 18, 1977. However, the employer failed to respond.

Effective January 22, 1978 the claimant filed a primary claim for federal extended benefits. She checked the box on the form DE 1101C to indicate she had been laid off for lack of work with the instant employer. On January 24, 1978 the Department mailed a notice of the claimant's federal extended claim (DE 1101C) to the employer. The employer's response dated January 25, 1978 contained the following statement in answer to the question in Item A, "If this person quit or was fired, explain in detail. . . .": "DID NOT RETURN FROM LEAVE OF ABSENCE."

The employer's response at that time raised a question as to whether the claimant had voluntarily left her job and misinformed the Department as to the reason she was no longer working. The Department contacted the claimant's supervisor by telephone and was then informed that the claimant had been laid off due to a lack of work as there was no work for her when she returned from her leave of absence.

On February 9, 1978 the Department mailed a notice of potential charge to the employer's reserve account due to the misinformation given by the employer in its response to the notice of the claimant's federal extended claim mailed to it on January 24, 1978. The notice of potential charge to the employer's reserve account stated in part:

> "The Department must make a determination on the application of Code Section 1030.5 . . . as it appears that the information you gave us in your original request for ruling and/or determination was erroneous or incomplete.
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> "Within 10 days of the mailing of this notice, you have an opportunity to submit an explanation that shows why the information in your protest should not be considered a wilful false statement or wilful failure to report a material fact."

The employer did not respond to the Department's request for an explanation of the information given by the employer in its original protest. On March 2, 1978 a notice of determination on employer false statement was mailed to the Department's central office by the local field office. Thereafter that notice was mailed to the employer which provided that under the provisions of

section 1142 of the Unemployment Insurance Code it had been assessed a cash penalty of ten times the claimant's weekly benefit amount of $62 in the total amount of $620.

By letter dated July 26, 1978 the employer filed its petition for reassessment to an administrative law judge which stated the employer's department manager had unintentionally and incorrectly filled out the employer's response to the notice of the federal extended claim. Further, the employer stated that in response to a phone call from the Department representative its department manager had confirmed their response was incorrect and did not know further action was required. The employer contended its personnel supervisor had not been informed of the notice of potential charge and that the notice had simply been filed. The employer further stated the information it had given was not incorrect, but incomplete.

REASONS FOR DECISION

Former code section 1030.5 was repealed and section 1142 was added to the Unemployment Insurance Code by Chapter 511, Statutes of 1977, filed September 3, 1977 and which became operative January 1, 1978. Section 1142 of the Unemployment Insurance Code now provides:

> "If the director finds that any employer or any employee, officer, or agent of any employer, in submitting facts concerning the termination of a claimant's employment pursuant to Section 1030, 1327, 3654, 3701, 4654, or 4701, willfully makes a false statement or representation or willfully fails to report a material fact concerning such termination, the director shall assess a penalty against the employer in an amount not less than 2 nor more than 10 times the weekly benefit amount of such claimant. The provisions of this article, the provisions of Article 9 (commencing with Section 1176) of this chapter with respect to refunds, and the provisions of Chapter 7 (commencing with Section 1701) of this part with respect to collections shall apply to the assessments provided by this section. Penalties collected under this section shall be deposited in the contingent fund."

Section 1133 of the code provides for a petition for reassessment of an assessment levied under code section 1142, as follows:

> "Any employing unit against whom an assessment is made under Section 1126, 1127, or 1142, or any person directly interested in such assessment, may file with a referee a petition for reassessment within 30 days after service of notice of the assessment. An additional 30 days for the filing of a petition may for good cause be granted by the referee. If a petition for reassessment is not filed within the 30-day period, or within the additional period granted by the referee, the assessment becomes final at the expiration of the period."

Prior to the repeal of former code section 1030.5, an employer was subject to a penalty if it wilfully made a false statement or representation or wilfully failed to report a material fact concerning the termination of a claimant's employment provided such facts were submitted pursuant to section 1030 or 3701 of the code. However, even if the facts submitted were patently false and wilfully made, the employer was not subject to a penalty if the facts were not submitted pursuant to section 1030 or 3701 of the code (Appeals Board Decision No. P-R-342).

In Appeals Board Decision No. P-R-342, relied on by the administrative law judge in the instant case, the Board stated that the phrase in code section 1030.5 ". . . in submitting facts pursuant to Section 1030 or 3701 . . .", punctuated as it was, was restrictive in that it limited the assessment of charges under section 1030.5 of the code to the situation wherein the employer has performed the acts which cause it to become entitled to a ruling under section 1030 or 3701 of the code. In that case, the employer had submitted an untimely response to a notice of a new claim filed and was therefore not entitled to a ruling. The Board held that since the employer's response was untimely the information was not submitted pursuant to section 1030 of the code.

The penalty which could be assessed under former code section 1030.5 was a charge against the employer's reserve account of not less than two nor more than ten times the claimant's weekly benefit amount. The enactment of code section 1142 changed the penalty for employers who wilfully make a false statement or representation, or wilfully fail to report a material fact concerning the termination of the employment of a claimant, from a charge against the employer's reserve account to a cash assessment. Further, the restrictive language in former code section 1030.5 was modified to include facts

submitted by an employer pursuant to sections 1327, 3654, 4654, or 4701 in addition to sections 1030 and 3701.

Under former code section 1030.5 the employer was penalized on the theory that charging an employer's reserve account will result in a higher experience rate and therefore higher unemployment insurance taxes. However, that had no effect on reimbursable employers who do not have reserve accounts and who are required to reimburse the Unemployment Insurance Fund for benefits paid to former employees or to employers with a negative balance in their reserve account, as they are already paying at the maximum tax rate.

In Appeals Board Decision No. P-R-342, the Board held that the language of former code section 1030.5 limited the assessment of charges to situations where the employer has performed the acts which cause it to become entitled to a ruling under section 1030 or 3701 of the code. The Board said:

> "It appears anomalous that an employer, who has made a willful false statement, may avoid charges to its account under section 1030.5 of the code simply by failing to comply with section 1327 of the code. However, employers may be deterred from taking advantage of this deficiency in the legislation by the provisions of Chapter 10, Part I, of the Unemployment Insurance Code, which make certain violations of the code misdemeanors. If this is an insufficient deterrent, as [sic] is a matter for legislative attention and is beyond our authority to remedy."

It is clear that the legislature intended to remedy the deficiency by the enactment of section 1142 of the Unemployment Insurance Code. Sections 1327, 3654 and 4654 of the code provide that the employing unit by which the claimant was last employed shall submit facts then known which may affect the claimant's eligibility for benefits within ten days after being notified of the filing of a new or additional claim for unemployment benefits, extended duration benefits or Federal-State extended benefits. Employers who submit such facts pursuant to sections 1327, 3654 or 4654 within the time limit specified are entitled to a determination and the reasons therefor and may appeal to an administrative law judge (sections 1328, 3655 and 4655, Unemployment

Insurance Code). Both employers who maintain reserve accounts and those that do not are entitled to such a determination and have the right to appeal to an administrative law judge.

As pointed out above, prior to the enactment of section 1142 of the Unemployment Insurance Code, employers were penalized under former code section 1030.5 only if they submitted information pursuant to code sections 1030 or 3701 which entitled such employers to a ruling. There was no provision that subjected an employer to any penalty merely because the employing unit submitted facts pursuant to code section 1327, 3654, or 4654. Since the applicable penalty consisted of a charge to an employer's reserve account, there was no penalty that applied to employers who did not maintain a reserve account.

With the enactment of code section 1142, all employers now come within the purview of that section who submit facts pursuant to section 1327, 3654, or 4654 and who are entitled to a determination, whether or not they would also be entitled to a ruling under code section 1030, 3701, or 4701. The penalty for wilfully making a false statement or representation or wilfully failing to report a material fact was of necessity changed to a cash assessment instead of a charge against the employer's reserve account in order that the penalty would apply equally to all such employers. Therefore, the assessment of a cash penalty under section 1142 of the code is not limited to only those situations wherein the employer is entitled to a ruling under section 1030 or 3701 of the code.

Under these circumstances, the rationale of Appeals Board Decision No. P-R-342 is no longer applicable to assessments levied under the provisions of section 1142 of the code. P-R-342 is inconsistent with our decision herein, and it is overruled.

Section 3551 of the Unemployment Insurance Code provides for the payment of extended duration benefits to eligible individuals who qualify as an "exhaustee" under section 3503(c) of the code.

Section 3654 of the Unemployment Insurance Code provides:

"The Department of Employment Development shall give a notice of the filing of a primary claim or an additional claim to the employing unit by which the exhaustee was last employed immediately preceding the filing of such claim. The employing unit so notified shall submit within 10 days after the mailing of such notice any facts then known which may affect the exhaustee's eligibility for extended duration benefits. The 10-day period may be extended for good cause. If after such 10-day period the employing unit acquires knowledge of facts which may affect the eligibility of the exhaustee and such facts could not reasonably have been known within the period, the employing unit shall within 10 days of acquiring such knowledge submit such facts to the Department of Employment Development."

Section 3655 of the Unemployment Insurance Code provides:

"The Employment Development Department shall consider the facts submitted by an employer pursuant to Section 3654 and make a determination as to the exhaustee's eligibility for extended duration benefits. The Employment Development Department shall promptly notify the exhaustee and any employer who prior to the determination has submitted any facts pursuant to Section 3654 of the determination and the reasons therefor. The exhaustee and any such employer may appeal therefrom to a referee within 20 days from mailing or personal service of notice of the determination. The 20-day period may be extended for good cause. The Director of Employment Development shall be an interested party to any appeal.

"'Good cause,' as used in this section, shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect."

Section 3701 of the Unemployment Insurance Code provides in part:

"(a) Any employer who is entitled under Section 3654 to notice of the filing of a primary claim or additional claim and who,

> within 10 days after mailing of such notice, submits to the Employment Development Department any facts within its possession disclosing whether the exhaustee left the most recent employment with such employer voluntarily and without good cause or was discharged from such employment for misconduct connected with his or her work, or whether the claimant was a student employed on a temporary basis and whose employment began within, and ended with his or her leaving to return to school at the close of, his or her vacation period, shall be entitled to a ruling as prescribed by this section. The period during which the employer may submit such facts may be extended by the Director of Employment Development for good cause.
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> "(b) The Employment Development Department shall consider such facts together with any information in its possession and promptly notify the employer of its ruling as to the cause of the termination of the exhaustee's most recent employment. The employer may appeal from a ruling or reconsidered ruling to a referee within 20 days after mailing or personal service of notice of the ruling or reconsidered ruling. The 20-day period may be extended for good cause, which shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect. . . ."

In the present case the employer submitted a timely written statement under section 3654 of the code in response to the notice of the claimant's federal extended claim, effective January 22, 1978, purporting to be the facts surrounding the claimant's termination of employment. The Department was therefore required under code section 3655 to issue a determination, based upon all the information which it possessed. However, since the employer failed to respond to the notice of the claimant's original claim filed effective July 17, 1977, the Department was not required to issue a ruling under section 3701 of the code (Appeals Board Decision No. P-R-363).

Having submitted information concerning the reasons for the claimant's termination pursuant to section 3654 of the code, the employer is subject to the penalty provisions of code section 1142 if it wilfully made a false statement or representation or wilfully failed to report a material fact concerning the reasons for the claimant's termination of employment.

Here, the employer submitted information in response to the notice of the claim filed by the claimant on January 24, 1978 which indicated the claimant did not return from her leave of absence. That information was false as the claimant did return from her leave and was informed the employer had no job for her. Although it is true the claimant did not return to work after her leave of absence, the employer withheld the information that she did not return to work because they had no job for her at that time.

There need not be an intent to deceive in order that the submission of false information may be considered a wilful misrepresentation (Diagnostic Data, Inc. v. California Unemployment Insurance Appeals Board, 34 Cal. App. 3d 556, 110 Cal. Rptr, 157). The employer herein withheld information that it had no job for the claimant when she returned from her leave of absence and its statement that the claimant did not return from her leave of absence was incorrect. Whether or not the employer intended to misrepresent the facts, its act was wilful and the assessment of a cash penalty was proper. Since the employer did subsequently correct the false information submitted to the Department even though it did not respond to the notice of potential charges, it is appropriate to reduce the maximum assessment from ten times the claimant's weekly benefit amount to five times the claimant's weekly benefit amount (Appeals Board Decision No. P-R-343).

DECISION

The decision of the administrative law judge is reversed and the assessment is modified. The employer is assessed a cash penalty of five times the claimant's weekly benefit amount of $62, in the total amount of $310.

Sacramento, California, July 10, 1979.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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